

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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WAKEEM BUTLER,

Petitioner,

-against-

MEMORANDUM AND ORDER  
98-CV-0427 (ILG)

UNITED STATES OF AMERICA,

Respondent.

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GLASSER, United States District Judge

The petitioner has moved this court for an order that would correct his presentence report which he claims erroneously reflects that he was charged with using or carrying a firearm during and in relation to a crime of violence, namely, obstructing, delaying and affecting commerce by robbery in violation of 18 U.S.C. § 924(c). He contends, although obliquely, that the condition of his incarceration is adversely affected because of the reflection of that charge in the report. For the reasons that follow, his motion is denied.

Background

On November 9, 1990, the petitioner together with two others robbed a check cashing business in Brooklyn, New York. The petitioner held a witness at gun-point outside the premises while the others, who were also armed, followed guards from an armored truck into the premises and forcibly took from them \$151,000 in cash. The three were apprehended shortly thereafter. The petitioner was indicted and charged with conspiracy to obstruct, delay and affect commerce by robbery and, in a second count, with armed robbery. Following a three-day jury trial he was found guilty on both counts. On May 16, 1991, the petitioner was sentenced to imprisonment for 126 months to be followed by a three year term of supervised release. His conviction and

sentence was affirmed on appeal in United States v. Butler, 970 F. 2d 1017, 1027 (2d Cir. 1992).

This motion is dated December 15, 1997, at the federal institution at which he is incarcerated and is, therefore, deemed to have been filed on that date, Houston v. Lack, 487 U.S. 266 (1988), more than five years after the affirmance by the Court of Appeals. Although his motion makes no reference to the statutory authority upon which he relies, the court will deem it to be made pursuant to Rule 32, Fed. R. Cr. P. which is precisely applicable. That Rule provides, in substance, that within 14 days after receiving a presentence report the parties shall communicate any objections to it to the probation officer, 32(b)(6)(B). The probation officer must then, not later than 7 days before sentencing, submit the presentence report to the court together with an addendum setting forth unresolved objections, 32(b)(6)(C). At the sentencing hearing, the court must give defendant's counsel an opportunity to comment upon the probation officer's determinations and on other matters relating to the appropriate sentence and the court must rule on them, 32(c)(1). Because the petitioner is specific in moving "for correction of presentence report" it is Rule 32 rather than Rule 35 which is implicated.

United States v. Giaimo, 880 F. 2d 156 (2d Cir. 1989) is dispositive and requires that the motion be denied. There, the defendant sought the correction of his presentence report several months after he was sentenced relying upon Fed. R. Cr. P. 32. The Court held that "Rule 32, standing alone, does not give a district court jurisdiction to correct inaccuracies in a PSI report after a defendant has been sentenced." 880 F. 2d at 1563 (citations omitted). See also, United States v. Angiulo, 57 F. 3d 38, 41 (1<sup>st</sup> Cir. 1995).

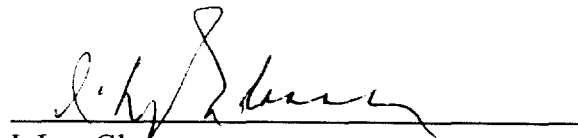
The denial of this motion required by Giaimo makes superfluous a discussion of Campino v. United States, 968 F. 2d 187 (2d Cir. 1992) (no showing of cause or prejudice resulting from not raising issue on appeal precludes collateral attack) and of U.S.S.G. § 2B3.1(b)(2)(C) which

provided for a 3 level increase for possession of a dangerous weapon which Butler doesn't dispute he possessed.

For the foregoing reasons, the motion is denied.

SO ORDERED.

Dated: Brooklyn, New York  
September 1, 1998

  
I. Leo Glasser

Copies of the foregoing memorandum and order were sent to:

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